RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 1)

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–363 OF 2001
ABDUL MALIK ISHAK J
16 NOVEMBER 2003

Banking — Banks and banking business — Banking regulations — Approval to institutions acquiring shares — Period in disposing off shares — Banking and Financial Institutions Act 1989 ss 66, 67, 116(2), 125

Banking — Banks and business — 0 — Increase in interest rate — Certificate of indebtedness — Original rate at 13.25%pa on quarterly rests basis — Whether entitled to charge compound interest based on supplemental agreement

Civil Procedure — Summary judgment — Affidavit — Admissions by defendant — Inconsistency in defendant's affidavit — Whether triable issues raised — Whether suitable case for summary judgment — Rules of the High Court 1980 O 14

Contract — Termination — Right to terminate — Whether plaintiff required to terminate agreements between parties — Whether share sale agreement still subsists

Sometime in 1997, Ekran Berhad proposed to offer 257,143,286 new ordinary shares ('the new shares') to its registered shareholders. At the request of Ekran Berhad and pursuant to the underwriting agreement dated 13 March 1997, the plaintiff together with 16 other financial institutions agreed to underwrite the new shares in the agreed portions in the event that the new shares were unsubscribed. The plaintiff's portion was to the maximum and it constituted 1,750,000 new shares. Pursuant to the underwriting agreement, the plaintiff purchased 1,490,496 shares ('the underwritten shares') from Ekran Berhad which were transferred to the Central Depository account of the plaintiff's nominees. Pursuant to the share sale agreement dated 11 June 1997 and the supplemental agreement dated 23 March 1998, the defendant purchased the underwritten shares from the plaintiff at RM8,495,827.20 to be paid in four instalments. The first instalment was paid on 11 September 1997 and shares were released to the defendant. Subsequently, despite several extensions, the defendant still failed to pay the plaintiff the balance of the purchase price. The plaintiff's claim against the defendant was for the balance of the purchase price together with interest as stipulated in the various agreements between the plaintiff and the defendant. According to the plaintiff, it was a clear cut case of an O 14 application. But the defendant contested the matter and argued that there were triable issues that should proceed to trial. The learned senior assistant registrar had on 3 May 2002 allowed the plaintiff's application for an O 14 of the Rules of the High Court 1980. This was the defendant's appeal.

Held, dismissing the appeal:

(1) It was clearly a share sale agreement and not a loan agreement as alleged by the defendant. To go to the extreme, even if that share sale

agreement was construed as a loan agreement, which was not the case here, the defendant had by failing to make the requisite payments to the plaintiff had breached the agreement and so the defendant must be held to be indebted to the plaintiff for the sums outstanding under the share sale agreement. The share sale agreement and the supplemental agreement had been duly executed by the defendant and the defendant should not, with impunity, be allowed to dispute his liability thereunder (see paras 5, 7).

(2) Although the share sale agreement originally stipulated the interest rate of 13.25%pa on quarterly rests basis, yet this had been superceded by the supplemental agreement. And flowing from that, it could be inferred that cl 3.1 of the share sale agreement remained binding on the defendant and the plaintiff was therefore entitled to charge the compound interest until full settlement of the amount outstanding. It was germane to mention that the courts had consistently held that interest which had been contractually agreed upon were valid and binding on the contracting parties (see paras 8, 13).

(3) There was no requirement for the plaintiff to terminate the agreements between the parties. The various settlement agreement showed that the share sale agreement still subsists and that there was no requirement for the plaintiff to terminate the agreement as contended by the defendant. It was evident from the settlement agreement dated 13 March 2000 that the last instalment to be paid by the defendant was due on 30 June 2000 and that the plaintiff's demand for the full outstanding sum was on 5 December 2000 and that this suit was only filed on 9 March 2001. Clearly therefore, the plaintiff was entitled to claim for the whole amount outstanding from the defendant even if the agreement between the plaintiff and the defendant had not been terminated and, in any event, the plaintiff was saying that the agreement had since been terminated (see paras 24–25).

(4) The certificate of indebtedness expressly stated that the interest rate was to be calculated on a daily basis and to be compounded monthly. The applicable interest rate would be the one stipulated in the supplemental agreement and not in the share sale agreement. The defendant was also unable to provide any good reason to dispute the plaintiff's certificate of indebtedness. The defendant here merely questioned the plaintiff's right to impose the default and compound interests. Nor was there any issue on the variation of interest rate nor was there any allegation of the variation rate or that no notice had been given (see paras 29, 34–35).

(5) In relation to s 66 of the Banking And Financial Institutions Act 1989 ('BAFIA'), this section is subject to any regulations made under s 116(2) of the BAFIA. By virtue of the Bank Negara Malaysia circular dated 8 November 1991, Bank Negara had given the necessary approval to institutions acquiring shares despite the prohibition in s 66 of the BAFIA provided that the shares acquired as a result of an underwriting commitment are disposed off within the

span of 12 months or such longer period as Bank Negara may allow, which the plaintiff did disposed of within three months after acquiring those shares. As for s 67 of the BAFIA, this section applies only to credit facilities given to any person. Here, it is a share sale agreement and not in regard to a credit facility agreement. Moreover, even if there has been a contravention of the statutory requirements of the BAFIA, there is a savings provision in s 125 of the BAFIA, the agreements between the plaintiff and the defendant would remain valid and binding on the defendant (see paras 39–44).

(6) The admissions made by the defendant remained a vital consideration for the High Court on the question of whether the defendant was indebted to the plaintiff especially in the light of the fact that the defendant was now seeking to deny his liability to the plaintiff. The admissions by the defendant would be sufficient to show that the defendant cannot, in the circumstances, raise any bona fide dispute to the plaintiff's claim herein (see para 46).

[**Bahasa Malaysia summary**

Sekitar 1997, Ekran Berhad telah bercadang untuk menawarkan 257,143,286 saham-saham biasa baru ('saham-saham baru') kepada pemegang-pemegang saham berdaftarnya. Atas permintaan Ekran Berhad dan menurut perjanjian ditaja jamin bertarikh 13 Mac 1997, plaintif bersama 16 institusi kewangan lain telah bersetuju untuk menaja jamin saham-saham baru tersebut dalam bahagian-bahagian yang dipersetujui sekiranya saham-saham baru tersebut tidak dijual. Bahagian plaintif adalah yang paling maksimum dan ia membentuk 1,750,000 saham-saham baru. Menurut perjanjian ditaja jamin tersebut, plaintif telah membeli 1,490,496 saham-saham ('saham-saham ditaja jamin') daripada Ekran Berhad yang telah dipindahkan kepada akaun Pusat Depositori calon-calon plaintif. Menurut perjanjian jualan saham bertarikh 11 Jun 1997 dan perjanjian tambahan bertarikh 23 Mac 1998, defendan telah membeli saham-saham ditaja jamin tersebut daripada plaintif pada harga RM8,495,827.20 yang akan dibayar dalam empat ansuran. Ansuran pertama telah dibayar pada 11 September 1997 dan saham-saham telah diberikan kepada defendan. Berikutan itu, meskipun selepas beberapa lanjutan, defendan masih gagal untuk membayar plaintif baki harga belian. Tuntutan plaintif terhadap defendan adalah untuk baki harga belian beserta faedah sebagaimana yang ditetapkan dalam pelbagai perjanjian antara plaintif dan defendan. Menurut plaintif, ia adalah nyata satu kes permohonan A 14. Tetapi defendan mencabar perkara tersebut dan berhujah bahawa terdapat persolan-persoalan yang perlu dibicarakan yang patut didengar. Penolong kanan pendaftar yang bijaksana telah pada 3 Mei 2002 membenarkan permohonan plaintif untuk satu A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Ini adalah rayuan defendan.

Diputuskan, menolak rayuan tersebut: **A**

(1) Ia adalah jelas satu perjanjian jualan saham dan bukan satu perjanjian pinjaman sebagaimana yang dikatakan oleh defendan. Secara ektremnya, meskipun perjanjian jualan saham tersebut ditafsirkan sebagai perjanjian pinjaman, yang bukan kesnya di sini, defendan telah dengan kegagalan untuk membuat bayaran yang dikehendaki **B** kepada plaintif melanggar perjanjian tersebut dan oleh itu defendan hendaklah dikatakan berhutang kepada plaintif bagi jumlah yang belum dijelaskan tersebut di bawah perjanjian jualan saham tersebut. Perjanjian jualan saham dan perjanjian tambahan telahpun disempurnakan sewajarnya oleh defendan dan defendan tidak patut, bebas daripada hukuman, dibenarkan mempertikaikan liabiliti beliau **C** (lihat perenggan-perenggan 5, 7).

(2) Walaupun perjanjian jualan saham pada asalnya menyatakan kadar faedah 13.25% setahun setiap suku tahun, namun in telah diatasi oleh perjanjian tambahan. Dan berdasarkan itu, ia boleh diinferkan bahawa kl 3.1 perjanjian jualan saham masih mengikat defendan dan **D** plaintif oleh itu berhak untuk mengenakan faedah kompaun sehingga penyelesaian penuh ke atas jumlah yang belum dijelaskan. Ia adalah relevan untuk menyebutkan bahawa mahkamah telah memutuskan secara konsisten bahawa faedah yang telah dipersetujui secara kontraktual adalah sah dan mengikat ke atsa pihak-pihak dalam kontrak tersebut (lihat perenggan-perenggan 8, 13). **E**

(3) Tiada keperluan untuk plaintif menamatkan perjanjian-perjanjian antara pihak-pihak. Pelbagai perjanjian penyelesaian menunjukkan bahawa perjanjian jualan saham masih wujud dan tidak terdapat apa-apa keperluan untuk plaintif menamatkan perjanjian tersebut sebagaimana yang ditegaskan oleh defendan. Adalah jelas daripada **F** perjanjian penyelesaian bertarikh 13 Mac 2000 bahawa ansuran terakhir yang perlu dibayar oleh defendan adalah pada 30 Jun 2000 dan tuntutan plaintif untuk jumlah penuh yang belum dijelaskan adalah pada 5 Disember 2000 dan guaman ini telah difailkan pada 9 Mac 2001. Adalah jelas oleh itu, plaintif berhak untuk menuntut keseluruhan jumlah yang belum dijelaskan daripada defendan **G** walaupun perjanjian antara plaintif dan defendan tidak ditamatkan dan, dalam apa keadaanpun, plaintif menyatakan bahawa perjanjian telahpun ditamatkan (lihat perenggan-perenggan 24–25).

(4) Sijil keberhutangan dengan jelas menyatakan bahawa kadar faedah telah dikira berdasarkan harian dan dikompaunkan setiap bulan. **H** Kadar faedah yang terpakai adalah yang ditetapkan dalam perjanjian tambahan dan bukan dalam perjanjian jualan saham. Defendan juga tidak dapat memberikan alasan baik untuk mempertikaikan sijil keberhutangan plaintif. Defendan di sini hanya menyoal hak plaintif untuk mengenakan faedah kegagalan dan kompaun. Tiada juga persoalan tentang perubahan kadar faedah maupun terdapat apa-apa **I** pengataan tentang perubahan kadar dan tiada notis telah diberikan (lihat perenggan-perenggan 29, 34–35).

(5) Berkaitan s 66 Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA'), seksyen ini tertakluk kepada mana-mana peraturan yang di buat di bawah s 116(2) BAFIA. Menurut pekeliling Bank Negara Malaysia bertarikh 8 November 1991, Bank Negara telah memberikan persetujuan yang sewajarnya kepada institusi-institusi yang memperoleh saham-saham meskipun sekatan dalam s 66 BAFIA memperuntukkan bahawa saham-saham yang diperolehi hasil daripada komitmen tajaan jamin telah dijual dalam tempoh 12 bulan ata suatu tempoh lebih lama yang Bank Negara mungkin benarkan, yang mana plaintif telah jual dalam tempoh tiga bulan selepas memperoleh saham-saham tersebut. Berhubung s 67 BAFIA, seksyen ini terpakai hanya untuk kemudahan kredit yang diberikan kepada seseorang. Di sini, ia adalah satu perjanjian jualan saham dan bukan berkaitan satu perjanjian kemudahan kredit. Tambahan pula, meskipun terdapat percanggahan keperluan statutori BAFIA, terdapat satu peruntukan pengecualian dalam s 125 BAFIA, perjanjian-perjanjian antara plaintif dan defendan adalah masih sah dan mengikat ke atas defendan (lihat perenggan-perenggan 39–44).

(6) Pengakuan yang dibuat oleh defendan masih memerlukan pertimbangan Mahkamah Tinggi berhubung persoalan sama ada defendan berhutang kepada plaintif terutamanya berhubung fakta bahawa defendan sekarang memohon untuk menafikan liabiliti beliau kepada plaintif. Pengakuan oleh defendan adalah mencukupi untuk menunjukkan bahawa defendan tidak boleh, dalam keadaan sedemikian, menimbulkan apa-apa pertikaian bona fide terhadap tuntutan plaintif (lihat perenggan 46).]

Notes

For cases on affidavits, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5688–5716.

For cases on banking regulations, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1646–1647.

For cases on compound interests, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1666.

For cases on right to terminate, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4589–4593.

For business banking, see 12 *Halsbury's Laws of Malaysia* paras [200.585]–[200.771].

For summary judgment, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6-048]–[10.6-063].

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Bank of Commerce (M) Bhd v Tan Boon Soon @ Tan Po Lo & Anor [1993] MLJU 174 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369 (refd)

Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (refd)
Foo Yoke Foon v Public Bank Bhd [2000] 3 MLJ 728 (refd)
Hillas & Co v Arcos (1932) 147 LT 503 (refd)
Kapital Raya Sdn Bhd lwn Bloomville Corp Sdn Bhd [1996] 3 MLJ 522 (refd)
Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank [1994] 2 MLJ 559 (refd)
Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd [2000] 3 MLJ 136 (refd)
Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860 (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)
Malayan Banking Bhd v Yeo Sun Tong [1999] 6 MLJ 377 (refd)
Multi-Purpose Bank Bhd v Maimoon bte Abdul Razak [1999] 6 MLJ 215 (refd)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen [2000] 3 MLJ 555 (refd)
Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461 (refd)
Supermarl Ltd v Federated Homes Ltd 9 Const LR 25 (refd)
Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd [2000] 3 MLJ 254 (refd)

Legislation referred to

Banking And Financial Institutions Act 1989 ss 61, 66, 67, 116(2), 125
Banking Institutions (Acquisition And Holding Of Shares And Interests In Shares) (Licensed Banks, Licensed Finance Companies And Licensed Merchant Banks) Regulations 1991 reg 3
Rules of the High Court 1980 O 14

Yoong Sin Min (Tharmy Ramalingam with her) (Shook Lin & Bok) for the plaintiff.
Dato' Muhammad Shafee Abdullah (Jeffrey John with him) (Shafee & Co) for the defendant.

Abdul Malik Ishak J:

Introduction

[1] This was the defendant's notice of appeal dated 7 May 2002 as seen in encl 14 against the decision of the learned senior assistant registrar on 3 May 2002 in allowing the plaintiff's application under O 14 of the Rules of the High Court 1980 ('the RHC') against the defendant as set out in the summons in chambers in encl 3 dated 21 May 2001.

The facts

[2] Sometime in 1997, Ekran Berhad proposed to offer 257,143, 286 new ordinary shares ('the new shares') to its registered shareholders. At the request of Ekran Berhad and pursuant to the underwriting agreement dated 13 March 1997, the plaintiff together with 16 other financial institutions agreed to underwrite the new shares in the agreed portions in the event that the new shares were unsubscribed. The plaintiff's portion was to the maximum and it constituted 1,750,000 new shares. Now, pursuant to the underwriting agreement, the plaintiff purchased 1,490,496 shares ('the underwritten shares') from Ekran Berhad which were transferred to the Central Depository account of the plaintiff's nominees. Pursuant to the share sale agreement dated 11 Jun 1997 and the supplemental agreement dated 23 March 1998, the defendant purchased the underwritten shares from the plaintiff. It was an express term of the share sale agreement that the purchase price of RM8,495,827.20 will be paid in four instalments. On 11 September 1997, the defendant paid the sum of RM1,133,320.07 to the plaintiff as the first instalment. Upon receipt of that money, the plaintiff had on 11 September 1997 released to the defendant 149,049 of the shares. Subsequently, at the request of the defendant, the plaintiff agreed to grant the defendant several extensions of time to enable the defendant to effect payment of the balance of the purchase price. But despite the extensions, the defendant still failed to pay to the plaintiff the balance of the purchase price. The plaintiff's claim against the defendant was for the balance of the purchase price together with interest as stipulated in the various agreements between the plaintiff and the defendant. According to the plaintiff, it was a clear cut case of an O 14 application. But the defendant contested the matter and argued that there were triable issues that should proceed to trial.

[3] Were there triable issues as suggested by the defendant? With respect, there were none. Nevertheless, it is my duty to examine the alleged triable issues that were raised by the defendant and I shall now proceed to do so.

That the agreement dated 11 June 1997 — referred to herein as the share sale agreement, was not a loan agreement

[4] I have to reproduce cl 1.1 of the share sale agreement and it is worded as follows:

> The Vendor (referring to the plaintiff) sells and the Purchaser (referring to the defendant) purchases the sale shares for the aggregate purchase price of Ringgit Malaysia Eight Million Four Hundred Ninety Five Thousand Eight Hundred Twenty Seven and Sen Twenty (RM8,495,827.20) only based on the price per Sale Share of Ringgit Malaysia Five and Sen Seventy (RM5.70) only.

[5] It is a pure question of interpretation. The rule of interpretation is this. That ordinary words must be given their plain and simple meaning as applied by the Court of Appeal in the case of *Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd* [2000] 3 MLJ 254. In my judgment, there is no ambiguity to the words

employed in cl 1.1 of the share sale agreement. It is clearly a share sale agreement and not a loan agreement as alleged by the defendant. To go to the extreme, even if that share sale agreement is construed as a loan agreement, which was not the case here, the defendant has by failing to make the requisite payments to the plaintiff had breached the agreement and so the defendant must be held to be indebted to the plaintiff for the sums outstanding under the share sale agreement.

[6] The irresistible conclusion — nay the reasonable and inescapable finding would be this, that the defendant must be held liable to the plaintiff to pay the amount outstanding under the share sale agreement and the defendant, to date, has failed to do so. It would be ideal, at this juncture, to refer to the case of *Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen* [2000] 3 MLJ 555 and the headnotes at pp 556–557 merit reproduction:

> (3) On the face of it the underwriting agreement was properly executed. The defendant admitted signing it. Nothing in the document showed that it was not intended to be a legally binding agreement. The defendant while asserting that the underwriting agreement was a sham failed to advance or point to any source of evidence to support his assertion that the agreement was a sham. Indeed no collateral arrangement was pleaded in the defence and counterclaim as would explain why the plaintiff would enter into a sham agreement. Upon the failure of the defendant to plead it, the argument ought to be disregarded. Upon the failure of the defendant to point to any evidence or source of evidence of any such collateral agreement, no triable issue of a collateral contract can arise as would affect the underwriting agreement (see pp 572H, 573F–G).
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> (4) If the defendant had signed the agreement with the intention that it be a sham, he would not rely upon that unlawful and dishonest act for his benefit. It would be wholly contrary to public policy and public interest to accept that a duly executed agreement could be set aside by a party as a sham and upon the unilateral assertion that he intended it to be a sham. Considering the foregoing, the absence of any evidence that the inherently incredible assertions could be supported by evidence of documents or testimony of persons named by the defendant who could give evidence in support of such assertions, led the court to conclude these assertions sought to be raised as issues were not triable, and no real purposes would be achieved by holding a trial (see pp 573H–574A).
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> (5) The plaintiff had otherwise performed all of its advisory and underwriting obligations. The arguments of the underwriting agreement lacking consideration and not intended to be binding, and of the advisory services not being performed with the requisite care and skill being plainly unsustainable, the appeal was allowed with costs and judgment was entered in terms of the O 14 application (see p 575A).

[7] And when the above passages are applied to the facts of the present appeal, it would mean this. That the share sale agreement and the supplemental agreement have been duly executed by the defendant and the defendant should not, with impunity, be allowed to dispute his liability thereunder.

Mutually agreed interest rate between the parties cannot be disputed

[8] In prayer (b) of encl 3, the plaintiff claimed for interest and it was at the rate of 5%pa above the plaintiff's cost of funds on daily basis and compounded monthly from 30 November 2000 to the date of full settlement. Now, this claim for interest – at 4%pa above the plaintiff's cost of funds on daily basis and compounded monthly with additional late payment (default interest of 1%pa), was contractually stipulated in the supplemental agreement dated 23 March 1998 as reflected in cll 1.3 and 3.1 thereof. That supplemental agreement has been duly signed by the defendant and this cannot be disputed. Although the share sale agreement originally stipulates the interest rate of 13.25%pa on quarterly rests basis, yet this has been superceded by cl 7 of the supplemental agreement which states:

> In the event of any conflict or inconsistency between the provisions of the Share Sale Agreement and this Agreement, the provisions of this Agreement shall prevail. Except as amended or modified hereby, all the provisions of the Share Sale Agreement shall remain in full force and effect and the Share Sale Agreement as so amended and modified shall form and after the date of this Agreement be read as a single, integrated document incorporating the said amendments and modifications.

[9] So, it would be apparent that the prevailing interest rate would be 5% above the plaintiff's cost of funds as prayed for in encl 3.

[10] It must be borne in mind that the interest as demanded by the plaintiff has, at all material times, been consistent with the stipulated interest rate of 5% above the plaintiff's cost of funds. The difference in the interest rates are principally due to the fluctuating rate of the plaintiff's cost of funds at different periods of time as reflected in the table below:

(a) 19%pa (being 5% above the plaintiff's cost of funds of 14% pa as at 1 May 1998) — see p 57, exh 'RHB-4' in encl 4;

(b) 10.80%pa (being 5% above the plaintiff's cost of funds at 5.8%pa as at 1 June 2000) — see p 74, exh 'RHB-11' in encl 4;

(c) 11%pa (being 5% above the plaintiff's cost of funds at 6%pa as at 30 November 2000) — see p 77, exh 'RHB-12' in encl 4;

(d) 19%pa (being 5% above the plaintiff's cost of funds of 14%pa as at 1 May 1998) — see p 71, exh 'RHB-18' in encl 8;

(e) 17.70%pa (being 4% (without the default interest) above the plaintiff's cost of funds of 13.70%pa as at 1 June 1998) — see p 71, exh 'RHB-18' in encl 8; and

(f) 20.95%pa (being 4% (without the default interest) above the plaintiff's cost of funds of 16.95%pa as at 1 February 1998) — see p 43, exh 'RHB-19' in encl 10.

[11] So, it can be surmised that the different interest rates as stated and made known by the plaintiff to the defendant were computed in strict accordance and in compliance with the terms of the supplemental agreement. Be that as it may, the defendant had made part payment to the

plaintiff without even in any manner protesting at the interest rate that has changed. It can safely be said that in raising this issue the defendant lacked bona fide.

[12] It was alleged by the defendant that the plaintiff was not entitled to claim for the compound interest by virtue of the plaintiff's letter in exh 'RHB-10' of encl 4. This allegation, to say the least, was totally misconstrued. A perusal of the plaintiff's letter would show the following phraseology:

> 7 All other terms as set out in the Agreements shall remain valid and binding except as varied herein.

[13] And flowing from that, it can be inferred that cl 3.1 of the share sale agreement remains binding on the defendant and the plaintiff is therefore entitled to charge the compound interest until full settlement of the amount outstanding. It is germane to mention that the courts have consistently held that interest which has been contractually agreed upon are valid and binding on the contracting parties. The following cases would suffice:

(1) *Foo Yoke Foon v Public Bank Bhd* [2000] 3 MLJ 728 (CA);

(2) *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (CA);

(3) *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 (FC); and

(4) *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461 (FC).

[14] In *Realvest Properties Sdn Bhd*, the Federal Court declared as void default interest if made payable from the date of contract as distinct from the date of default. Here, the defendant had defaulted in making payment of the amounts due as at 30 April 1998 under the supplemental agreement. That being the case, the plaintiff was certainly entitled to impose the default interest for the amounts outstanding at any time after 1 May 1998. This was my judgment and I so hold accordingly.

The issue that security was provided to secure the purchase price

[15] This was an issue that was raised as a mere red herring. It was an irrelevant issue governing the plaintiff's claim against the defendant. The plaintiff's claim was pure and simple for the monies unpaid by the defendant for the purchase of the shares sold by the plaintiff. The issue of security cannot detract from the defendant's liability to pay the plaintiff the proceeds due from the sale of those shares.

[16] In my considered view, the express words of cl 2.4 of the share sale agreement, cl 1.1.2 of the supplemental agreement and the defendant's letters as seen at pp 63, 64, 65, 75 and 80 of encl 8 clearly showed the clear intention of the defendant to place the shares purchased by the defendant from the plaintiff as security for the sums outstanding from the defendant to the plaintiff. Again this should not detract from the liability of the defendant to pay the plaintiff.

[17] This was not the case where the parties have expressed themselves in vague or incomplete terms. The court will not wish to 'incur the reproach of being the destroyer of bargains' (per Lord Tomlin in *Hillas & Co v Arcos* (1932) 147 LT 503 at p 412). Here, the parties have entered into a contract and they have used clear and unambiguous terms. It is a legally enforceable agreement giving rise to obligations for the parties to adhere and comply. I must give effect to the contract. Having agreed to buy those shares, the defendant must now be held accountable to pay the plaintiff. It was as simple as that.

The plaintiff had failed to sell the shares at RM1.80 per share

[18] There was an arrangement by way of a letter dated 13 March 2000 whereby the defendant agreed to the plaintiff selling the pledged shares at the minimum price of RM1.80 per share. It must be emphasized that the pledged shares were publicly listed shares and the sale of those shares would only be possible if there was a willing buyer. The plaintiff categorically stated that it could not sell those shares as the share prices never reached the price fixed by the defendant at the rate of RM1.80 per share. An analysis of the share prices annexed as exh 'RHB-18' of encl 10 would show that the prices of the shares between 13 March 2000 to 23 August 2001 ranged from the region of 0.50 sen (lowest on 4 September 2001) to RM1.70 sen (highest on 29 March 2000). It must be borne in mind that the defendant has not denied the contents of exh 'RHB-18' of encl 10 and the defendant too has failed to provide any evidence to refute that exhibit. It was sought to equate the plaintiff's so called omission to sell the shares with the circumstances in the case of *Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd* [2000] 3 MLJ 136 (CA). That was clearly wrong because *Lai Kok Kit*'s case was concerned with the failure of the defendant in complying with an obligation it undertook to do, namely, to withdraw an order for sale. Here, in contrast, there was an express agreement between the plaintiff and the defendant to sell the shares at the minimum price of RM1.80 per share. The plaintiff's obligation to sell those shares at this minimal price was obviously conditional upon such shares achieving such minimal price on the stock exchange. The stock exchange market was unpredictable. It is the same even today. So, I must conclude that the plaintiff was not in breach of any agreement. Incidentally, if the defendant felt that the shares could be sold at RM 1.80 per share or more, the defendant could have notified the plaintiff of this or the defendant could even have arranged the sale. But, alas, the defendant did nothing of that sort.

The defendant had specifically asked for several extensions of time

[19] As to how this issue could ever be classified as a triable issue is beyond me. Letters emanating from the defendant showed that the defendant himself had asked for indulgence and had asked for extensions of time to make payment of the various instalments payable to the plaintiff. The defendant too had duly signed and accepted the terms and conditions of the various settlement agreements and so the defendant must be

estopped from denying that he had asked the plaintiff for the extensions of time. It cannot be denied that the supplemental agreement clearly stipulated that the share sale agreement shall remain in full force and effect save as amended by the supplemental agreement.

Was there clear default by the defendant?

[20] I should answer this question in the positive. It is beyond doubt that the defendant has defaulted in paying the requisite instalments under the share sale agreement, the supplemental agreement and the various settlement agreements. This is clearly evident from the defendant's own letters of admission as listed below:

(1) letter dated 29 December 1997 (see p 43 of encl 4);

(2) letter dated 10 September 1999 (see p 63 of encl 4);

(3) letter dated 23 September 1999 (see p 64 of encl 4);

(4) letter dated 7 October 1999 (see p 66 of encl 4);

(5) letter dated 16 December 1999 (see p 70 of encl 4);

(6) letter dated 11 November 1999 (see p 75 of encl 8);

(7) letter dated 16 December 1999 (see p 76 of encl 8);

(8) letter dated 30 May 2000 (see p 78 of encl 8); and

(9) letter dated 29 Jun 2000 (see p 79 of encl 8).

[21] It would also be ideal to set out the various deadlines for payments of the balance of the purchase price and I shall do so now:

(a) under cl 3.1 (d) of the share sale agreement only part payments were made and the dateline for full payment was on 10 June 1998;

(b) under cl 1.2.8 of the supplemental agreement only part payments were made and the defendant issued the letter of 14 May 1998 to the plaintiff reiterating his commitment to the defendant's obligations and the dateline for full payment was on 30 September 1999;

(c) part payments were made as reflected in the plaintiff's letter dated 5 July 1999 and the defendant too made a request by letter dated 10 September 1999 seeking deferment of the full payment to 11 October 1999 and this was followed by the defendant's letter of 23 September 1999 for full repayment by 11 December 1999 and the dateline for full payment was supposed to be on 4 September 1999;

(d) the defendant by letter dated 16 December 1999 asked for further indulgence and the dateline for full payment was on 30 December 1999;

(e) from the plaintiff's letter dated 13 March 2000, it can be seen that the first part payment was received and the second cheque for part payment that was due on 31 May 2000 was dishonoured and the dateline for full payment was on 30 June 2000;

(f) according to the plaintiff's letter dated 13 March 2000, the defendant's cheque for part payment was dishonoured and the dateline for full payment was on 30 December 2000; and

(g) according to the plaintiff's letter dated 21 June 2000, a request was made for the cheque to be replaced and the dateline for full payment was on 30 December 2000.

[22] Now, all these letters as alluded to above were accepted by the defendant.

[23] It was submitted on behalf of the defendant that the plaintiff had failed to terminate the agreements. By way of a reply, it was rightly submitted on behalf of the plaintiff that there was no requirement for the plaintiff to terminate the agreements between the parties. I will now allude to the various settlement agreements:

(1) the supplemental agreement was worded like this (the relevant parts):

> 3 DEFAULT — The parties agree that (3.1.1) if the Purchaser defaults in payment of any sums due under this Agreement or under this Share Sale Agreement on the respective dates as set out in clause 1.2 above ... any and all monies payable by the Purchaser to the Vendor under this Agreement and/or under the Share Sale Agreement shall become due and payable immediately without further demand being made by the Vendor together with further interest thereon …

(2) the settlement agreement dated 5 July 1999 was worded in this way (the relevant parts):

> … in the event of default any one of the terms herein, we reserve our right to:
>
> (i) treat as we deem fit this arrangement as null and void and of no further effect whatsoever;
>
> (ii) to immediately commence and/or continue with any action for the recovery of the total original outstanding sum owing to us including interest and default interest and costs incurred …

(3) the settlement agreement dated 21 October 1999 was worded, inter alia, like this (the relevant parts only):

> All other terms as set out in the Settlement Agreement dated 11 July 1999 shall remain valid and binding except as varied herein.

(4) the settlement agreement dated 13 March 2000 was worded, inter alia, like this also (the relevant parts):

> 7 All other terms as set out in the Agreement shall remain valid and binding except as varied herein.

(5) the settlement agreement dated 21 June 2000 was phrased, inter alia, in this way (the relevant parts only):

> 3 For the avoidance of doubt, we reserve all our rights under our letter dated 13 March2000 …

[24] That was indeed interesting. It showed that the share sale agreement still subsists and that there is no requirement for the plaintiff to terminate the agreement as contended by the defendant.

[25] I will now allude to the authorities relied upon by the defendant and I must say that those authorities can readily be distinguished. In *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860, the creditor there only issued a demand for the hire purchase agreement and thereafter purported to claim against the guarantor for the entire outstanding sum due. The Court of Appeal was of the view that the creditor was not entitled to the full outstanding sum as there was no express termination of the hire purchase contract. The Court of Appeal speaking through NH Chan JCA aptly stated at p 865 of the report that 'the plaintiff still has the right to recover instalments due under the agreement' even though the contract had not been terminated. I am of the considered view that this case is of no assistance to the defendant for the following reasons:

(i) it is evident from the settlement agreement dated 13 March 2000 that the last instalment to be paid by the defendant was due on 30 June 2000 and that the plaintiff's demand for the full outstanding sum was on 5 December 2000 and that this suit was only filed on 9 March 2001; and

(ii) clearly therefore, the plaintiff here is entitled to claim for the whole amount outstanding from the defendant even if the agreement between the plaintiff and the defendant had not been terminated and, in any event, the plaintiff is saying that the agreement has since been terminated.

[26] In *Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559, Anuar J (as he then was and who later rose to be the CJ (Malaya)) aptly said at pp 569-570 of the report:

> In the *Law and Practice of Compromise* by David Foskett (3rd Ed) the learned author states [at p 107]:
>
> 'Generally speaking, therefore, an agreement of compromise will discharge all original claims and counterclaims *unless* it expressly provides for their revival in the event of breach. Reference had been made previously to a compromise defeasible upon condition subsequent. Where a party is anxious to be able to revive his original claim in the event of the other party's failure to comply with his obligations under the compromise, a term to that effect (which will, in effect, be one defeating the compromise upon the failure of the subsequent condition) should be incorporated. This applies to mere agreements and those effectuated by a judgment or order reflecting finality.' (Emphasis added).
>
> In *Supermarl Ltd v Federated Homes Ltd* 9 Const LR 25, it was held that where there is a valid compromise agreement about claims, breach of its terms does not revive the original claims.
>
> Having very carefully read and re-read the redemption agreement, I can find nothing that has reserved unto the defendant bank the right to pursue the foreclosure proceedings to the hilt in the event of the plaintiff failing, for any reason, to fulfil its obligation. Indeed, the opening words of cl 5 are 'For the avoidance of

ambiguity', which go to show that the parties were intent on making it absolutely clear what they meant to have between them under the agreement.

In the circumstances, it is my judgment that the redemption agreement replaced the charges recited in it and once it was entered into, the effect was to denude those charges of any legal effect.

[27] Likewise here, the various settlement agreements preserved the terms of the share sale agreement as well as the supplemental agreement. I must say something in regard to the case of *Supermarl Ltd v Federated Homes Ltd* 9 Const LR 25 which was referred to by Anuar J in the case of *Kuala Lumpur Landmark Sdn Bhd*. In that case — referring to *Supermarl Ltd*, the court there decided the case on the fact that there was nothing that had preserved the bank's right to pursue the foreclosure proceedings. Whereas in the present appeal before me, the plaintiff had preserved all its rights in the previous agreements.

Did the plaintiff breach the agreement?

[28] I would answer this question in the negative. It was a fact that in accordance with the terms of the agreements, the plaintiff had transferred some of the shares in proportion to the amount paid by the defendant. This was never denied by the defendant. Nothing turned on this issue. It was not triable.

The certificate of indebtedness

[29] Now, the certificate of indebtedness expressly stated that the interest rate was to be calculated on a daily basis and to be compounded monthly. But the defendant alleged that the interest rate claimed in the certificate of indebtedness did not correspond with the interest rate stipulated in the share sale agreement. With respect, I must state that the applicable interest rate would be the one stipulated in the supplemental agreement and not in the share sale agreement. That being the case, the interest rate as set out in the certificate of indebtedness was indeed correct. Proceeding along the same direction, I must refer to the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, a decision of the Federal Court. In that case, Raja Azlan Shah CJ (Malaya) (as his Majesty then was) succinctly said at p 284 of the report:

That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC Order 14 procedure. In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus, 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal

representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v. National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LLLR 437.

In the circumstances, the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

[30] And likewise here, the plaintiff was entitled to the judgment as prayed for. This meant that the appeal in encl 14 should be dismissed with costs.

[31] I must now refer to cl 10 of the supplemental agreement and it is worded in this way:

CONCLUSIVENESS – Any certificate, determination; notification or opinion of the Vendor provided for, pursuant to this Agreement, including without limitation, any determination by the Vendor in relation to its cost of funds and any sums payable under the Principal Agreement and/or this Agreement, shall in the absence of manifest error, be conclusive evidence of the same.

[32] And it is valid and binding on the defendant.

[33] Under this head, I will now proceed to examine the authorities relied upon by the defendant. In *Multi-Purpose Bank Bhd v Maimoon bte Abdul Razak* [1999] 6 MLJ 215, the court was concerned with a foreclosure proceeding and the difference between the rates of interest and the factors relied upon in order to calculate the rates. It was irrelevant to consider this authority because in the present appeal there was no change of the interest as claimed by the plaintiff.

[34] In *Bank of Commerce (M) Bhd v Tan Boon Soon @ Tan Po Lo & Anor* [1993] MLJU 174, the defendants had given the court good reasons to question the accuracy of the plaintiff's certificate and this prompted the court to disregard the certificate. Whereas in the present appeal before me, the defendant was unable to provide any good reason to dispute the plaintiff's certificate of indebtedness. The defendant here merely questioned the plaintiff's right to impose the default and compound interests.

[35] In *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556, the court refused to enforce the conclusive evidence clause as no notice of the variation of interest rate had been sent by the plaintiff to the defendant. Here, in the present appeal before me, the issue in regard to the variation of interest rate did not arise at all nor was there any allegation of the variation rate or that no notice had been given.

[36] Again in the case of *Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377, there was a dispute in regard to the variation of the interest rate as well as the failure on the part of the plaintiff to respond to the defendant's request for particulars of the variation of the interest rate. Whereas in the present appeal there was no request made by the defendant for the particulars of the interest or the debt.

[37] I have endeavoured to show the factual differences of the authorities relied upon by the defendant to the facts of the present appeal. Be that as it may, it must be emphasized that although the defendant claimed that the certificate of indebtedness was erroneous, yet the defendant did not venture to state what the amount claimed should in fact be.

The share sale agreement and the supplemental agreement do not contravene ss 61, 66 and 67 of the Banking And Financial Institutions Act 1989 ('BAFIA')

[38] In regard to s 61 of the BAFIA, I must categorically state that this section is not applicable because the transaction in the present appeal concerned a sale of shares and not a loan as alleged by the defendant. At any rate, the defendant's liability together with that of the companies related to him did not exceed the plaintiff's single customer limit at the material time. This averment can be seen at para 32 (b) of encl 10 and the defendant did not deny this averment.

[39] In relation to s 66 of the BAFIA, I state that this section is subject to any regulations made under s 116(2) of the BAFIA. It was quite apparent that the defendant has failed to take into account reg 3 of the Banking Institutions (Acquisition And Holding Of Shares And Interests In Shares) (Licensed Banks, Licensed Finance Companies And Licensed Merchant Banks) Regulations 1991 which states as follows:

> 3 Notwithstanding anything contained in regulation 2, a licensed bank, a licensed finance company or a licensed merchant bank, may acquire or hold shares or interests in shares in any corporation and to such extent as may be approved in writing by the Bank, subject to such terms, conditions, restrictions or limitations as may be specified in the approval.

[40] I must proceed further to state that by virtue of the Bank Negara Malaysia circular dated 8 November 1991, Bank Negara has given the necessary approval to institutions acquiring shares despite the prohibition in s 66 of the BAFIA provided that the shares acquired as a result of an underwriting commitment are disposed off within the span of 12 months or such longer period as Bank Negara may allow. Now, it must be remembered that the plaintiff acquired the shares under the underwriting agreement on 13 March 1997. The plaintiff then entered into the sale and purchase agreement with the defendant for the sale of those shares on 11 June 1997 thereby effectively disposing off the shares within three months after acquiring those shares — this was well within the conditions imposed by Bank Negara.

[41] Pertaining to s 67 of the BAFIA, it would be appropriate to say that this section applies only to credit facilities given to any person. Pertaining to the appeal before me, it was in respect of a share sale agreement and not in regard to a credit facility agreement. Here, no money passes from the plaintiff to the defendant. Bluntly put, no sum of money has been disbursed by the plaintiff to the defendant.

Savings provision in s 125 of the BAFIA

[42] Even if the plaintiff has breached the requirements of the BAFIA as alleged by the defendant, which was not the case here, the plaintiff was still entitled to rely on the savings provision as found in s 125 of the BAFIA which states as follows:

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this Act shall be void solely by reason of such contravention:
>
> Provided that nothing contained in this section shall affect any criminal liability of any person for an offence under this Act in respect of such contravention.

[43] In *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369, the Supreme Court held that the mere fact that an agreement or arrangement was in contravention of the BAFIA was not in itself sufficient to render the said agreement or arrangement to be void; to be void, so the Supreme Court held, there must be some other provisions in the BAFIA which has that effect. The law was nicely put in the case of *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 by the Federal Court when his Lordship Edgar Joseph Jr FCJ aptly said at p 321 of the report:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. (See *Holman v Johnson* (1775) 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 thuswise:
>
> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a *general rule*, but for complete accuracy it needs qualification, because *it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable*. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. *Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.* (Emphasis added.)

[44] So it can be surmised that since there is a savings provision in s 125 of the BAFIA, the agreements between the plaintiff and the defendant would remain valid and binding on the defendant even if there has been a contravention of the statutory requirements of the BAFIA. This would mean that the defendant's obligation to repay the plaintiff the sums

outstanding for the sale of the shares remained intact. That obligation would now be a liability for the defendant to discharge.

[45] In my judgment, the agreements between the plaintiff and the defendant did not become void and unenforceable. The transaction entered into by the parties must be held to be valid and, in consequence thereof, the defendant must make payment for the purchase of those shares to the plaintiff.

Admissions made by the defendant

[46] Without a doubt, the admissions made by the defendant remained a vital consideration for this court on the question of whether the defendant was indebted to the plaintiff especially in the light of the fact that the defendant was now seeking to deny his liability to the plaintiff. The admissions by the defendant would be sufficient to show that the defendant cannot, in the circumstances, raise any bona fide dispute to the plaintiff's claim herein. In my judgment, the defendant had no defence on the merits against the plaintiff's claim for the following reasons:

(1) the defendant has admitted signing the share sale agreement and the supplemental agreement; and

(2) the defendant did not deny paras 9 to 13 of the plaintiff's affidavit in support in encl 4 and those paragraphs lucidly set out the agreed terms of the sale of those shares.

[47] I would even venture to say that on the authority of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA), the following set of facts would be deemed to be admitted by the defendant:

(a) the defendant had failed to pay the second instalment due under the share sale agreement;

(b) the defendant had obtained an extension of time from the plaintiff in order to settle the balance of the purchase price due under the share sale agreement;

(c) the defendant had entered into the supplemental agreement dated 23 March 1998 with the plaintiff;

(d) the terms of the supplemental agreement were agreed to by the defendant; and

(e) the underwritten shares were pledged to the plaintiff in the name of the plaintiff's nominees as security for the repayment of the balance of the purchase price owed by the defendant to the plaintiff under the share sale agreement and under the supplemental agreement.

[48] Furthermore, the letters issued by the defendant himself showed a clear admission of the defendant's obligation to pay the plaintiff. The relevant letters will now be categorized:

(a) Letter dated 29 December 1997 which was quite damning was worded like this:

I am still making efforts to assist the purchasers in obtaining finance and shall be able to meet my obligation to settle the second instalment with you once payments from the purchasers are received.

(b) Letter dated 7 October 1999 where the defendant made a specific request for an extension of time to make payments due under the share sale agreement and the supplemental agreement; in this letter too the defendant referred to the plaintiff's letter dated 5 July 1999 and the defendant admitted that the balance outstanding to the plaintiff was RM4,281,896.91 as at 11 October 1999 and the defendant also stated that the plaintiff was entitled to claim interest from 11 October 1999; and of crucial importance would be the plaintiff's letter dated 5 July 1999 which alluded to the interest rate in this way:

… with interest thereon at 5%pa above our cost of funds, on daily basis and compounded monthly from 9 April 1999 to the date of full payment ...

[49] and I must say that this averment corresponded with the interest prayed for in paragraph (b) of the plaintiff's application for summary judgment in encl 3.

(c) Letter dated 16 December 1999 where the defendant wrote:

We spoke recently on the outstanding of RM4,281,896.91 that I owe your merchant bank. I am currently in a financially difficult position and will not be able to meet my obligation to settle the amount by 31 December 1999.

(d) Letters dated 17 April 1998, 22 December 1998 and 13 December 1999 where the defendant admitted that the shares were pledged to the plaintiff's nominees pursuant to the supplemental agreement.

(e) Letter dated 14 May 1998 where the defendant wrote:

I wish to reassure you that pending settlement of the proposed arrangement, I remain committed to my obligation under the agreements.

(f) Letter dated 15 May 1998 where the defendant has made part payment in settlement of the sums outstanding under the share sale agreement and the supplemental agreement.

(g) Letters dated 11 November 1999, 16 December 1999, 20 March 2000, 30 May 2000 and 29 June 2000 showed the clear admissions by the defendant of his outstanding debt to the plaintiff where the defendant, inter alia, wrote:

I am deeply appreciative of the indulgence you have granted me in trying to resolve my debt problem.

(h) Letter dated 21 February 2000 which was admitted by the defendant in paragraph 36 of encl 9.

(i) Letters dated 11 September 1997 and 12 September 1997 which showed the part payments made by the defendant.

[50] All these letters spoke a thousand words. It was very damaging to the defendant. These damning letters made this appeal a cut above the rest. It showed the magnitude of the defendant's liability to the plaintiff. So I can safely conclude, based on these letters, that any defences which the defendant might contemplate to raise and rely would be mere afterthoughts and not bona fides. The Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, at p 408 said of an O 14 application in these erudite words:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[51] Now, these passages were adopted by the Court of Appeal in the case of *Kapital Raya Sdn Bhd lwn Bloomville Corp Sdn Bhd* [1996] 3 MLJ 522.

[52] Another interesting fact must be highlighted. The defendant's affidavit in reply in encl 6 and the defendant's second affidavit in reply in encl 9 were unsupported by any documents whatsoever. Applying the principle of law as enunciated by *Bank Negara Malaysia*, the defendant's allegations in these two affidavits were 'inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself.'

[53] I must now refer to the case of *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, a decision of the Federal Court. There Seah FJ delivering the judgment of the Federal Court laid down the law in these terms (see p 301 of the report):

> For the purposes of an application under O 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

[54] I would say with alacrity that the plaintiff has succeeded in establishing a prima facie case for summary judgment and the burden must now fall on the defendant to satisfy me why judgment should not be given against him. Clearly, the defendant has failed to discharge the burden. The

plaintiff's case against the defendant was clear cut and there was no defence on the merits. Indeed this was a suitable case for summary judgment and the decision of the learned senior assistant registrar should be upheld.

Conclusion

[55] For the reasons as adumbrated above, I dismissed the appeal in encl 14 with costs.

Appeal dismissed.

Reported by Sally Kee Seok Meng